Supreme Court, U.S.
FILED

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No. 03 222 AUG 8 2003

In The
Supreme Court of the United States

CITY OF OKLAHOMA CITY,

Petitioner,

v.

SHAUNA E. SMITH,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Has the Tenth Circuit decided an important issue of federal law concerning the applicable statute or period of limitations in a Title VII hostile work environment case that should be decided by this Court in regard to how long an employer can be held vicariously liable for the conduct of a supervisor whose alleged acts of misconduct occurred more than 1200 days prior to any charge of discrimination with the EEOC and more than four years prior to filing of a lawsuit?

II. Did the Tenth Circuit create a standard which is in conflict and incorrectly expands the holding in the case of *National Railroad Passenger Corp. v. Morgan*, an intervening United States Supreme Court case, in applying the continuing violation theory to allow a claimant to abrogate the statutory filing requirements for filing an administrative charge with the EEOC regarding a subsequent discrete act of discrimination?

PARTIES

All parties are listed in the caption. Petitioner, The City of Oklahoma City, a municipal corporation and charter city of the first class organized pursuant to the laws of the State of Oklahoma, will be referred to as "Petitioner" or "City." Respondent, Shauna E. Smith, will be referred to as "Respondent" or "Smith."

The initial case filing included the following individually named defendants: L.D. Allen; Don Browning; Paul Burley; Thomas Hart; Mike Heath; Dale Marshall; Billy Pratt; Nathan Pyle; Darren Raines; David Shupe; Marty Stupka; and Mike Williams. The trial court granted the individual motions to dismiss these defendants. There was no appeal by Smith as to these dismissed individual defendants; therefore, they are not parties to this proceeding.

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CITATION TO OPINION

The Tenth Circuit's three-judge panel's Order and Judgment, handed down on April 14, 2003, has not been published. Pursuant to Rule 14(1)(i) of the Rules of the Supreme Court, the Order and Judgment is reproduced in the Appendix (App. 1-12). The Petitioner's Petition for Rehearing and Rehearing En Banc was denied on May 13, 2003 and the Order denying rehearing and rehearing en banc is reproduced in the Petitioner's Appendix (App. 25-26).

JURISDICTION

The Tenth Circuit Court of Appeals entered its judgment and order on April 14, 2003, and subsequently denied rehearing and rehearing en banc on May 13, 2003. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1). Under Supreme Court Rule 13, the Petition is timely filed on or before August 11, 2003, 90 days from the date of the denial for rehearing.

STATUTORY PROVISIONS

Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e)(1), provides in pertinent part:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten

days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

STATEMENT OF THE CASE

Smith was employed as a police officer for the Oklahoma City Police Department on September 29, 1989, and following graduation from the police academy was initially assigned as a field officer. In 1991, Smith was assigned as an IMPACT officer, which included working with the vice unit undercover and in plain clothes. Effective December 14, 1994, Smith was selected to fill a Canine ("K-9") Handler vacancy working out of the Hefner Division of the Oklahoma City Police Department. In June 1995, Smith completed her training and received certification as a K-9 officer. This appeal concerns, in major part, the vicarious liability of the Petitioner for the alleged discriminatory conduct of Smith's training officer, Sergeant Don Browning, during the period from January 1, 1995 through April 18, 1995.

Beginning in January 1995, Smith was teamed with a K-9 dog named "X." At that time Smith and X were assigned to begin canine training with Sergeant Browning. When not in training, Smith remained assigned to her regular assignment out of the Hefner Division of the Oklahoma City Police Department.

At trial Browning described his training responsibilities as taking new teams through a training program that would prepare them for a minimum standard that was set for the streets. Smith's training included everything from basic obedience through patrol work, such as field searches, article searches, tracking, narcotics detection, and other related tasks. Effective training is deemed necessary to limit potential liability for the City.

Browning testified he was having problems with Smith's performance in that she did not agree with his training methods. One day while training on obedience, X was showing hostility toward Smith and bit her. At the next training session Browning asked Smith if she was having her menstrual cycle, which he thought might have caused X to bite her.

Smith's K-9 training by Browning was stopped after the bombing of the Alfred P. Murrah Federal Building, so Browning and his dog could search for survivors. Sometime after the search efforts had stopped in June of 1995 Lieutenant L. D. Allen, at the request of Sergeant Browning, reassigned Smith to a new K-9 trainer. Smith was certified as a K-9 officer in June 1995, and at that time returned full time to the Hefner Division of the Oklahoma City Police Department. Later in 1995, Smith obtained the rank of sergeant. The same rank held by Don Browning. After Smith's K-9 training was complete she had limited

contact with Browning and there were no additional complaints of harassment that arose from this limited contact. Sergeant Browning and his dog retired from the Oklahoma City Police Department in July 1998.

On July 22, 1998, Smith filed a written notice of a possible hostile/harassment work environment with Deputy Police Chief Mike Heath. Police Chief Major T. Berry referred Smith's complaints to the Office of Professional Standards – Public Integrity Unit for investigation on July 23, 1998. Smith's concerns were investigated and a report was issued to Chief Berry in September 1998. On November 13, 1998, Chief Berry ordered the Office of Professional Standards to investigate four additional concerns raised by Smith, or her union representatives, that related to Smith's claims of a possible hostile work environment. The investigator's report was submitted to Chief Berry on or around December 18, 1998. In regard to each of the complaints made by Smith, Chief Berry reviewed the findings and recommendations of the investigators and requested recommendations from officers in Smith's chain of command. After reviewing the recommendations from his staff, Chief Berry notified Smith of his determination concerning her claims of harassment and hostile work environment. No formal disciplinary action was taken in regard to the any of the allegations made by Smith.

Smith's complaints to Chief Berry included allegations against several coworkers, including Sergeant Don Browning; however, her complaints against Browning only arose from the time period he was her K-9 training officer from January 1995 through April 18, 1995. Some of the allegations against Browning were the result of comments reported to Smith by other coworkers, at a later time.

On August 28, 1998, Smith filed her first Charge of Discrimination with the local office of the EEOC (App. 27-29). In this charge she claimed that during her employment she had been "subjected to continuing acts of discriminatory acts of harassment, unwarranted disciplinary action and unequal terms and conditions of employment." On February 3, 1999, while her first charge was still pending with the EEOC, Smith filed a second Charge of Discrimination, claiming retaliation for filing the August 28, 1998, charge of discrimination against the police department. (App. at 32-35.) Dismissal and Notice of Rights letters were issued by the EEOC on both charges on August 27, 1999.

There was evidence presented during the trial that Smith's performance as a police officer, and in particular as a K-9 Officer, was progressively deteriorating. She was frequently tardy, absent, and insubordinate. Following a pattern of progressive discipline, on January 27, 1999, Smith received a Class III Reprimand after a review board hearing and was involuntarily transferred out of the K-9 unit of the Hefner Division to the Will Rogers Division as a patrol officer. (App. at 29-32.) Smith's rank and salary remained the same. However, Smith did not report to duty for the new assignment. On or around January 28, 1999, after receiving notice that she had been relieved of K-9 duties, plaintiff went off on extended sick leave. After Plaintiff exhausted more than four months of sick leave, she was directed to provide documentation on why she could not return to work. Smith was also advised by police administration that she would be required to submit to a fitness-for-duty exam because of the lengthy time away from her job, and because she had made claims of job related stress. Smith refused to complete the fitness-for-duty exam. Plaintiff was informed that if she did not

provide medical documentation concerning her ability to return to work she would be subject to discipline, including termination. Plaintiff was given a predetermination hearing on August 16, 1999, at which hearing she was represented by the union president and the union attorney. She was terminated for refusing to provide the necessary medical documentation regarding her ability to return to work. Smith's union representatives then filed a grievance on her behalf and the City Manager reinstated Smith for 90 days from the date of her initial discharge of August 19, 1999, to give her the opportunity to provide the medical information concerning her return to work. Smith was advised that she needed to submit the requested documentation by November 18, 1999. On November 16, 1999, Smith faxed a letter to the Chief of Police, advising him that she was resigning from the Oklahoma City Police Department effective November 18, 1999.

Plaintiff filed this litigation on November 24, 1999, under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq*. In her Complaint she alleged gender discrimination, sexual harassment in the form of a sexually hostile work environment, retaliation for filing charges of discrimination with the Equal Employment Opportunities Commission, and constructive discharge based on the alleged hostile work environment. The case was tried to a jury in April 2001, and the jury rendered a verdict in favor of the City on April 23, 2001. Smith appealed the jury verdict and the Tenth Circuit Court of Appeals. The Tenth Circuit reviewed the appeal from the denial of Smith's Rule 59 motion for new trial. Petitioner's Brief was submitted in March 2002, and presented to the panel without consideration or argument regarding the applicability of this Court's opinion in

National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002). The Tenth Circuit panel reversed in part and remanded the case for a new trial on two issues: 1) the sexually hostile work environment claim, and 2) the claim of constructive discharge because of the alleged sexually hostile work environment. The panel decided the appeal in light of *Morgan*, but reversed the jury verdict without consideration of whether the vicarious liability claim against Browning was barred by equitable tolling or by laches or at law by an applicable statute or period of limitations.

The Tenth Circuit Court of Appeals reversed the jury verdict because the trial court in its jury instruction addressing the hostile work environment advised the jury that Don Browning was not a management level employee, which in the reasoning of the panel, prevented the jury from finding that the City might be vicariously liable for the alleged conduct of Sergeant Browning. However, the jury was allowed to consider the same allegations against Browning for purposes of determining the existence of a sexually hostile work environment.

The Tenth Circuit panel also determined that Smith was prejudiced in her constructive discharge claim because the jury was not allowed to find that the City was vicariously liable for Browning's alleged conduct in regard to the hostile work environment claim. This determination ignores the fact that Smith failed to file a subsequent charge of discrimination with the EEOC in regard to her termination or constructive discharges, both of which occurred months after her last charge of discrimination.

The Tenth Circuit's opinion in this case virtually eliminates any statute or period of limitations, in equity or

at law, for an employer's vicarious liability for the alleged conduct of a supervisor, for Title VII purposes. The City has filed this Petition for Writ of Certiorari seeking review of the Tenth Circuit's opinion that an employer can remain ***vicariously liable*** for a sexually hostile work environment allegedly created by or contributed to by the conduct of a supervisor more than four and a half years after the conduct ceased and more than 1200 days before any charge of discrimination is made with the EEOC against the employer.

There is no contention that Don Browning was involved in any allegation contributing to the alleged hostile work environment after April 18, 1995. Petitioner contends that even if Don Browning were a supervisor, any claim based on vicarious liability for his conduct as a supervisor is bared by equitable tolling, laches or by the statute of limitations set forth in Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e)(1). The Tenth Circuit panel's decision implies that the City, as employer, is perpetually vicariously liable for the conduct of a supervisor without regard to any equitable tolling or statute of limitations. Petitioner can find no case where this Court has addressed the issue of how long an employer can be held vicariously liable for the alleged conduct of a supervisor whose alleged acts of misconduct occurred more than 1200 days prior to any charge of discrimination with the EEOC and more than four years prior to filing of a lawsuit. Petitioner also contends that the jury verdict on Smith's constructive discharge claim should be affirmed since she did not file a subsequent charge of discrimination with the EEOC within the statutory period of limitations after her resignation from the Oklahoma City Police Department.

REASONS FOR GRANTING THE WRIT

This Petition for Writ of Certiorari is submitted to seek review of the Tenth Circuit's application of *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002) to the facts of this case on two issues, in particular, the Tenth Circuit's application of *Morgan* that creates new law in effect making an employer perpetually vicariously liable for alleged conduct of a supervisor whose alleged acts of misconduct occurred more than 1200 days prior to any charge of discrimination with the EEOC and more than four years prior to filing of a lawsuit, and whether the Respondent can maintain a cause of action for constructive discharge when she did not file a charge of discrimination with the EEOC after her constructive discharge.

Petitioner can find no case where this Court has addressed the issue of how long, or whether, an employer can be held vicariously liable for the alleged conduct of a supervisor whose alleged acts of misconduct occurred more than 1200 days prior to any charge of discrimination with the EEOC and more than four years prior to filing of a lawsuit, particularly when there are numerous intervening discrete acts. Petitioner requests this Court grant this Petition for Writ of Certiorari to address and answer this important legal issue left unresolved by this court's decision in *Morgan*. Petitioner contends that this Court should address this important question of federal law. Petitioner also contends that this Court should grant this Petition for Writ of Certiorari to review the Tenth Circuit's misapplication of or conflict with this Court's holding in *Morgan* when it allowed an earlier charge of discrimination filed

with the EEOC to validate the statutory filing requirements for a subsequent discrete act of discrimination, the Respondent's constructive discharge.

I.

THE TENTH CIRCUIT DECIDED AN IMPORTANT ISSUE OF FEDERAL LAW CONCERNING THE APPLICABLE STATUTE OR PERIOD OF LIMITATIONS IN A TITLE VII HOSTILE WORK ENVIRONMENT CASE THAT SHOULD HAVE BEEN DECIDED BY THIS COURT IN REGARD TO HOW LONG AN EMPLOYER CAN BE HELD VICARIOUSLY LIABLE FOR THE CONDUCT OF A SUPERVISOR WHOSE ALLEGED ACTS OF MISCONDUCT OCCURRED MORE THAN 1200 DAYS PRIOR TO ANY CHARGE OF DISCRIMINATION WITH THE EEOC AND MORE THAN FOUR YEARS PRIOR TO THE FILING OF A LAWSUIT.

In this case the reviewing panel for the Tenth Circuit Court of Appeals singles out the alleged conduct of one coworker, Don Browning, who arguably may have been a supervisor of the Respondent for the limited purpose of conducting canine training and for a limited period of time, and remands the case for a new trial on the premise that the original jury was not allowed to consider whether the Petitioner, as employer, was vicariously liable for the alleged conduct of Browning. Petitioner contends that the issue of whether or not Browning was a supervisor is not material to this case, because even if Browning was a supervisor, the Petitioner City's liability for his conduct, ***as a supervisor***, is barred by equitable tolling, such as laches, and is barred by the applicable statute or period of limitations set forth at 42 U.S.C. § 2000e(5)(e)(1). The

Respondent's allegations against Browning arose during the four-month period that he was her canine training officer, that period running from January 1, 1995 through April 18, 1995. The alleged discriminatory acts of Browning all occurred more than 1200 days prior to the filing of a charge of discrimination with the Equal Employment Opportunities Commission. Further, the charge of discrimination that was filed with the EEOC made no mention or reference to any conduct of Browning in either his status of co-worker or supervisor. And most importantly, the trial court did allow the jury to consider the alleged conduct of Browning in its deliberation on the existence of a hostile work environment, but not for purposes of vicarious liability.

In rendering its opinion, the Tenth Circuit panel references this Court's holding in *Morgan* to bolster its contention that the jury should have been allowed to consider whether the Petitioner City was vicariously liable for Browning's conduct, but totally ignores any possibility that the claims in regard to Browning, as a supervisor, may be barred or tolled in equity or barred by the applicable statute or period of limitations. The Tenth Circuit's application of *Morgan* to the facts of this case decides an important issue of federal law, and holds that an employer can be vicariously liable in perpetuity for the alleged sexually hostile conduct of a supervisor. Petitioner contends that the Tenth Circuit's decision on this important issue of federal law is in conflict with this Court's reasoning in *Morgan* and contains an important question of law that should be settled by the United States Supreme Court.

The principal issue concerns: How long is an employer vicariously liable for the conduct of a particular supervisor? Is there an applicable statute or period of limitations or equitable tolling of an employer's vicarious liability for the conduct of a particular supervisor? In light of this Court's opinion in *Morgan*, Petitioner contends that the claims involving Don Browning, premised on the theory of vicarious liability, are barred by 42 U.S.C.A § 2000e(5)(e)(1), or are tolled in equity by laches or some similar bar. Holding an employer vicariously liable for the conduct of a supervisor, whose alleged hostile conduct occurred more than 1200 days prior to the filing of any charge of discrimination with the EEOC, and who was not involved in any of the alleged continuing events constituting the hostile work environment, is an injustice and grossly unfair.

Petitioner acknowledges that this court has held that an employer can be vicariously liable for the conduct of a supervisor. The strict or vicarious liability of an employer for the conduct of a supervisor arises because of the special status of the employee as a supervisor. In *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 759-760, 118 S.Ct. 2257, 2268, 141 L.Ed.2d 633 (1998), this Court recognized that a person in the position of supervisor holds a special status when it recognized that a supervisor's harassment involves the "misuse of actual power" and while comparing the status of a supervisor to a co-worker, wrote, "The aided in the agency relation standard, therefore, requires the existence of something more than the employment relation itself." *Id.* at 524 U.S. 759-760.

Petitioner contends that if an employer's liability, under a theory of vicarious liability, requires that the employee hold the special status of supervisor, then there

must likewise be a statutory or period of limitations upon that strict vicarious liability. The Tenth Circuit panel's decision in this case effectively removes all limitations on vicarious liability and merges it with the hostile work environment as defined by this Court in *Morgan*. In *Morgan, supra,* 536 U.S. at 122, this Court held that a hostile work environment claim is comprised of a series of separate acts that collectively constitute one unlawful employment practice. While it makes sense that a hostile work environment is one unlawful employment practice, it is unlikely that this Court intended to make an employer strictly liable for a supervisor's alleged misconduct more than four years after the conduct ceased and where that supervisor did not participate in any of the subsequent on-going separate acts that make up the claimed unlawful employment practice, and where that supervisor's conduct was not a subject of any charge of discrimination filed with the EEOC by the employee.

The Tenth Circuit panel's decision in this case leaves an employer potentially liable for a supervisor's conduct even if the employer took action to remedy or correct the conduct of the supervisor, simply because the supervisor's conduct was one of many separate acts comprising the hostile work environment. Does this logic mean that an employer receives no benefit for remedial actions? The practical application of the Tenth Circuit's opinion in this case means that any future inappropriate act by any other employee or supervisor automatically revives the employer's vicarious liability for a prior supervisor's alleged misconduct. Certainly, this is not what this Court had in mind in *Morgan*. The consequence to the employer is that it can never do anything to eliminate its liability for a supervisor's conduct.

In light of the Court's holding in *Morgan* in regard to the one hostile work environment being comprised of a series of discriminatory acts, Petitioner contends that the statements and conduct of Sergeant Browning, as Plaintiff's canine training officer, during a five-month period in 1995 come within the definition of "discrete acts" identified in *Morgan*, because they are separate and distinct incidents of one particular person and ended when the Plaintiff was transferred to a different training officer. Therefore, the discrete acts of Browning as canine training officer are time-barred pursuant to the Title VII statute of limitations, 42 U.S.C. §§ 2000(e)-5(e)(1), *et seq.*, because Plaintiff Smith failed to file a charge of discrimination 300 days after the alleged unlawful practice, nor did she include them in her first EEOC charge filed some 1200 days thereafter. (See App. pp. 27-28.) Further, in *Morgan*, the Supreme Court noted that the Court of Appeals below had concluded that " . . . the pre- and post-limitations period incidents involve[d] the same types of employment actions, occurred relatively frequently, and **were perpetuated by the same managers**. . . . " *Morgan, supra,* 536 U.S. at 120. (Emphasis supplied.) In this case Browning was not involved in any aspect of the alleged on-going sexual harassment after April 1995. Since the Respondent's first charge of discrimination was filed with the EEOC on August 28, 1998, and which charges did not contain any allegations of sexual harassment on the part of Don Browning, Petitioner's vicarious liability for such dated misconduct should be barred in equity or by the applicable statute of limitations.

II.

THE TENTH CIRCUIT HAS CREATED A STANDARD WHICH IS IN CONFLICT AND INCORRECTLY EXPANDS THE HOLDING IN THE CASE OF *NATIONAL RAILROAD PASSENGER CORP. v. MORGAN*, AN INTERVENING UNITED STATES SUPREME COURT CASE, IN APPLYING THE CONTINUING VIOLATION THEORY TO ALLOW A CLAIMANT TO ABROGATE THE STATUTORY FILING REQUIREMENTS FOR FILING AN ADMINISTRATIVE CHARGE WITH THE EEOC REGARDING A SUBSEQUENT DISCRETE ACT OF DISCRIMINATION.

Smith argued on appeal to the Tenth Circuit that the trial court committed reversible error by instructing the jury: "The Court has determined that Sergeant Browning was not a management level employee." (App. 38.) However, there was no objection nor argument presented on appeal relative to the time frames given by the trial court for finding a sexual harassment hostile work environment claim. The Claim for Sexual Harassment – Hostile Work Environment – Essential Elements jury instruction provided:

> The Plaintiff must show, based upon the foregoing elements, that a hostile work environment existed during the period from November 1, 1997 to February 3, 1999. Incidents of alleged harassment occurring prior to November 1, 1997 may be considered part of Plaintiff's hostile work environment claim if they are part of a continuing pattern of discriminatory harassment. **Incidents occurring after** the Plaintiff filed her **second charge of discrimination** with the Equal Employment Opportunity Commission on February 3, 1999 may be considered as part of

> the Plaintiff's hostile work environment claim if they are **reasonably related** to the claims asserted in the Plaintiff's EEOC charge.

(App. 37-38.) (Emphasis supplied.)

After jury deliberations, the jury rendered a Defendant's verdict. The Respondent did not object to the referenced time period in the Jury Instruction and such time period was not the subject of the appeal.

The Tenth Circuit panel affirmed the City's verdict on Smith's retaliation claim because the determination of " . . . whether Browning was a supervisor does not affect the issue of liability" since Browning had ceased training Smith in April of 1995. (Order and Judgment at App. 10.) Notwithstanding, the City contends that the panel erred in reversing Smith's constructive discharge claim since " . . . Smith's constructive discharge claim was conditioned on her ability to prove a hostile work environment claim." (Order and Judgment at App. 9, FN 3.)

The panel applied the intervening *Morgan* case to the constructive discharge claim when it held:

> The City also argues that Browning was not Smith's supervisor during the relevant time period of her Title VII claims, i.e. November 1, 1997 through February 3, 1999. Because Smith alleged that Browning's conduct was part of the alleged hostile work environment, however, his conduct is considered as part of her timely hostile work environment claim. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S.Ct. 2061, 2075, 153 L.Ed.2d 106 (2002) (holding that because 'the incidents comprising a hostile work environment are part of one unlawful employment practice, the employer may be liable for all

> acts that are part of [the] single claim. In order for the charge to be timely, the employee need only file a charge within 180 or 300 days of any act that is part of the hostile work environment')
> . . .

(Order and Judgment at App. 8, FN 2.)

The panel applied the *Morgan* case to the timeliness issue on the Browning incidents since " . . . his conduct is considered as part of her timely hostile work environment claim." The panel incorrectly applied *Morgan* when it did not identify the involuntary transfer of Smith on January 27, 1999, as a discrete act, which should cut off any sexual harassment/hostile work environment claim regarding Browning for acts comprising the hostile work environment claim after said transfer. Additionally, the panel incorrectly applied *Morgan* when it did not review the timeliness of the constructive discharge claim in light of *Morgan* by noting that Smith failed to file a third EEOC charge subsequent to her involuntary transfer and her resignation some nine months later.

The *Morgan* decision cited with approval *United Airlines, Inc. v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977), which held that the discriminatory acts which fall within the statutory time period cannot be used to validate acts occurring outside the statutory time period. *Morgan, supra*, 536 U.S. at 111.

As noted in the scenarios discussed in *Morgan,* 536 U.S. at 118, there were intervening discrete acts of discipline that should have operated to cut off any possibility of recovery for the 1995 alleged Browning incidents and should, likewise, bar the constructive discharge claim since they are time barred and not reasonably related to

any alleged hostile sexual harassment claim within 300 days prior to Smith's second EEOC charge filed February 3, 1999, and certainly not relevant to the post-transfer actions.

The *Morgan* holding does not abrogate a claimant's duty to timely file a charge of discrimination with the EEOC for subsequent acts of discrimination, such as a claim of discriminatory termination or constructive discharge. *Morgan* specifically provides that prior acts are cut off by subsequent intervening discrete acts, such as reprimand, transfer and resignation. Smith resigned in November 1999, and her last charge of discrimination was filed on February 3, 1999. An error regarding Browning's purported supervisory status cannot be prejudicial since Smith's claim of constructive discharge was based upon retaliation for filing her first EEOC charge and other subsequent claims of harassment and discrimination; it was not based on any conduct of Browning. In applying *Morgan*, the panel failed to analyze the timeliness of the constructive discharge claim since Smith failed to file a third EEOC charge of discrimination subsequent to her resignation of November 18, 1999, some nine months after her second EEOC charge and when no acts within the charge period related to Browning's alleged acts.

Under the holding in the *Evans* case, Smith's failure to file a charge of discrimination with the EEOC subsequent to her resignation defeats her right to pursue a claim of constructive discharge. The Tenth Circuit failed to examine whether Smith had met her obligation under Title VII in regard to the constructive discharge claim. There is no lawful basis for overturning the jury's verdict on this issue. Further, the Tenth Circuit panel did not identify how Browning's statements were in any way

reasonably connected to Smith's claim of constructive discharge. The trial court had instructed the jury on "co-worker" acts and the jury returned a verdict in favor of the City. For purposes of the hostile work environment claim the jury did get to consider the alleged discriminatory conduct of Browning. Browning's status as a supervisor is totally irrelevant to the constructive discharge claim.

In *Morgan*, this Court considered whether acts occurring prior to the 300-day period of limitations were actionable and established two rules depending on the situation concerning a continuing violation theory and discrete acts. Title VII of the Civil Rights Act of 1964 specifically requires that a charge of discrimination be filed with the EEOC under oath or affirmation and within either 180 or 300 days after an "alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1). (Oklahoma has the 300-day requirement since the State has a fair employment agency.) City contends any error in the unobjected to instruction post-*Morgan* is not reversible error because the jury was not allowed to determine whether Browning was a management level employee, most particularly, in the constructive discharge claim, which is clearly a post-EEOC charge.

City further contends that Smith's resignation, even if it is a constructive discharge, was a discrete act, and thus time barred. Smith had simply been transferred to a new jobsite and she never reported to duty at that new jobsite. There is no evidence that Browning's isolated conduct was part of the component act falling within 300 days of her transfer or resignation.

For reasons cited here, Petitioner would urge this Court to grant its Petition for Writ of Certiorari.

Respectfully submitted,

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64 Fed.Appx. 122

United States Court of Appeals,
Tenth Circuit.

Shauna E. SMITH, Plaintiff-Appellant,

v.

CITY OF OKLAHOMA CITY, Defendant-Appellee,

and

L.D. Allen; Don Browning; Paul Burley; Thomas Hart; Mike Heath; Dale Marshall; Billy Pratt; Nathan Pyle; Darren Raines; David Shupe; Marty Stupka; Mike Williams, Defendants.

No. 01-6307.

April 14, 2003.

Garvin A. Isaacs, Nancy A. Zerr, Law Firm of Garvin Isaacs, Oklahoma City, OK, for Plaintiff-Appellant.

Diane Lewis, Dep. Mun. Counselor, Monica Culley Coleman, Office of Municipal Counselor, Oklahoma City, OK, for Defendant-Appellee.

Before *SEYMOUR*, *McKAY*, and *MURPHY*, Circuit Judges.

ORDER AND JUDGMENT*

MURPHY, Circuit Judge.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

I. INTRODUCTION

Shauna E. Smith ("Smith") filed this suit against her former employer, the City of Oklahoma City (the "City"), under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e – 2000e-17, alleging claims for sexual harassment hostile work environment, constructive discharge, and retaliation. After a trial on the merits, a jury returned a verdict in favor of the City.

Smith moved for a new trial under Rule 59 of the Federal Rules of Civil Procedure, arguing that the district court erred in instructing the jury that Sergeant Don Browning ("Browning") was not her supervisor and in admitting the City's training videotape into evidence. The district court denied the motion and Smith appeals. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, this court **affirms in part** and **reverses in part** the district court's denial of Smith's motion for a new trial.

II. BACKGROUND

Smith was employed as a police officer by the City from September 1989 until November 1999.

In 1993, Smith was assigned to the IMPACT unit of the police department. At trial, Smith testified that while in IMPACT, she attended an ethics training class during which a training videotape was shown. Smith testified that the videotape included scenes from a surveillance tape depicting an officer and a confidential informant engaging in sexual acts. Smith testified that the videotape produced by the City during discovery was edited and did not include the sexual acts that were shown during the training class. Johnny Loudermilk ("Loudermilk"), a

former police officer, testified that he attended the same training class and viewed the same videotape depicting sexual acts between the officer and the confidential informant. The district court admitted the videotape into evidence.

In response to Smith's and Loudermilk's testimony, the City called Captain Byron Boshell ("Boshell") who testified that he edited the videotape for the training class. Boshell, however, further testified that the original videotape did not include the sexual acts testified to by Smith and Loudermilk. The City moved to have the original videotape as edited by Boshell admitted into evidence. Smith objected, arguing that the City failed to produce the original videotape in discovery and did not list it as an exhibit in the pretrial order. The district court overruled Smith's objection and admitted the original videotape into evidence.

In December 1994, Smith was assigned to the position of K-9 officer. She began K-9 training in January 1995. From January 1995 until April 18, 1995, Smith trained with Browning. At trial, Smith presented evidence that Browning was responsible for assigning her a dog, provided her with daily one-on-one training on dog handling, maintained the kennels, and was responsible for determining whether Smith and her dog were "qualified" after the completion of training and various tests.

Smith also presented evidence that Browning assigned her what was referred to as the "psycho dog" or the "crazy dog" and instructed her to clean the kennels with a solution which caused her injury. Smith presented evidence that Browning was overheard informing two lieutenants, "Not to worry about it . . . [t]he cunt can't handle

that crazy dog. He'll eat her up and she'll be out of here and she'll be off K-9." Smith testified that Browning told her, in reference to women in Vietnam, "we . . . f* * * 'em and stick grenades [in their genitalia]." Smith also testified that Browning told her the United States Police Canine Association does not like women dog handlers because they have a "certain odor," and later asked if she had been menstruating when the dog bit her.

The City presented evidence that Browning submitted his training schedules to another supervisor for approval, was not a participant in Smith's performance evaluations, and was not authorized to discipline Smith or to make decisions concerning her leave. Further, the City presented evidence that the City's collective bargaining agreement ("CBA") does not list the rank of sergeant as a supervisory rank. At the close of Smith's evidence, the City moved for judgment as a matter of law, arguing, in part, that Smith failed to prove that Browning was her supervisor. The district court denied the City's motion, but found that Browning was not Smith's supervisor.

At the close of the evidence, the district court instructed the jury as follows:

> In order to establish her claim for hostile work environment sexual harassment under Title VII, the Plaintiff must prove by a preponderance of the evidence each of the following essential elements:
>
> . . . .
>
> *Sixth:* That a specific basis exists for imputing the conduct that created the hostile work environment to the Defendant City.
>
> . . . .

> With regard to the Sixth element identified above, the basis for imposing liability upon an employer depends upon whether the alleged harassment creating the hostile work environment is committed by a supervisor or by a co-worker. When the source of the alleged harassment is a co-worker, the Plaintiff must demonstrate either that the employer failed to provide a reasonable avenue for complaint, or that management-level employees knew or should have known about the harassment, yet failed to take appropriate remedial action. "Management level employees" are defined as those supervisors who possessed substantial authority over the terms and conditions of the harasser's or the harasee's employment, such as the ability to hire, promote, discharge or discipline. The Court has determined that Sgt. Don Browning was not a management level employee.
>
> When the sexually hostile work environment is created by the actions of a supervisor, the employer is liable unless the employer meets the elements of the affirmative defense described in the following Instruction.

Smith objected to the instruction that Browning was not her supervisor.

The jury returned a verdict for the City. Smith moved for a new trial, arguing that the district court erred in instructing the jury that Browning was not her supervisor and in admitting the City's training videotape into evidence. The district court denied Smith's motion.

III. DISCUSSION

This court reviews the district court's decision to deny a motion for a new trial for abuse of discretion. *Osteguin v. S. Pac. Transp. Co.,* 144 F.3d 1293, 1295 (10th Cir.1998). The denial of a motion for a new trial will be reversed "only if the trial court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Weese v. Schukman,* 98 F.3d 542, 549 (10th Cir.1996). This court, however, reviews *de novo* the district court's grant of the City's motion for judgment as a matter of law on the issue of whether Browning was Smith's supervisor. *Colorado Cross Disability Coalition v. Hermanson Family Ltd. P'ship I,* 264 F.3d 999, 1001 (10th Cir.2001).

A. Instruction regarding Browning's supervisory status

While this court reviews the "district court's decision to give a particular instruction for abuse of discretion," the instructions are reviewed "in their entirety de novo to determine whether the jury was misled in any way" and "whether the jury was adequately instructed on the applicable law." *United Phosphorus, Ltd. v. Midland Fumigant, Inc.,* 205 F.3d 1219, 1225 (10th Cir.2000) (quotation omitted). Further, "[r]eversal is appropriate only if there was prejudicial error." *Doering ex rel. Barrett v. Copper Mountain, Inc.,* 259 F.3d 1202, 1212 (10th Cir.2001).

Smith argues, by concluding as a matter of law that Browning was not Smith's supervisor and by instructing the jury on this issue, the district court committed reversible error. "An employer is subject to vicarious liability

to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 765, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998). Employers, however, are liable for a co-worker's harassment of a fellow employee only when the employer "knew, or should have known, about the hostile work environment and failed to respond in an appropriate manner." *See Wright-Simmons v. City of Oklahoma City,* 155 F.3d 1264, 1270 (10th Cir.1998); *see also Faragher v. City of Boca Raton,* 524 U.S. 775, 799, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998).

Whether Browning was Smith's supervisor is dependent on whether Browning "had sufficient control over [Smith] to be considered her supervisor." *Wright-Simmons,* 155 F.3d at 1271. To be considered a supervisor, one must have "the authority to affect the terms and conditions of the victim's employment." *Parkins v. Civil Constructors of Illinois, Inc.,* 163 F.3d 1027, 1034 (7th Cir.1998).

Smith presented evidence that Browning was responsible for assigning her a dog in the K-9 unit, providing her with daily one-on-one training, and ultimately deciding whether she and her dog were "qualified." The City argues that Browning was not a supervisor because the CBA does not list the position of sergeant as a supervisory position and because Browning did not participate in decisions regarding Smith's leave, annual performance evaluations, and discipline. While a jury could consider the City's evidence in determining whether Browning had sufficient control over Smith to affect the terms and conditions of her employment, the record does not support a determination that Browning was not Smith's supervisor as a matter of law. Because Browning directed Smith's daily tasks

from January 1995 through April 18, 1995 and was responsible for determining whether she and her dog were "qualified," a reasonable jury could conclude that Browning was Smith's supervisor. *See Faragher,* 524 U.S. at 781, 808 (noting that the supervisor was responsible for making daily lifeguard assignments, supervising fitness training, and controlling all aspects of day-to-day activities). Accordingly, the district court erred in not submitting to the jury the question of whether Browning was Smith's supervisor.[2]

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[2] The City also argues that Browning was not Smith's supervisor during the relevant time period of her Title VII claims, i.e. November 1, 1997 through February 3, 1999. Because Smith alleged that Browning's conduct was part of the alleged hostile work environment, however, his conduct is considered as part of her timely hostile work environment claim. *Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 122 S.Ct. 2061, 2075, 153 L.Ed.2d 106 (2002) (holding that because "the incidents comprising a hostile work environment are part of one unlawful employment practice, the employer may be liable for all acts that are part of [the] single claim. In order for the charge to be timely, the employee need only file a charge within 180 or 300 days of any act that is part of the hostile work environment."); *see also Boyer v. Cordant Techs., Inc.,* 316 F.3d 1137, 1140 (10th Cir.2003) (holding that "*Morgan* implicitly overruled [prior] Tenth Circuit cases to the extent these cases held that recovery on a Title VII hostile work environment claim is not available for acts taken outside the statutory time period where the plaintiff knew or should have known the conduct was discriminatory when the acts occurred"). Moreover, the district court instructed the jury that "[i]ncidents of alleged harassment occurring prior to November 1, 1997 may be considered as part of the Plaintiff's hostile work environment claim if they are part of a continuing pattern of discriminatory harassment." Accordingly, the jury could find the City vicariously liable for Browning's conduct even though it occurred prior to November 1, 1997. *See Morgan,* 122 S.Ct. at 2075; *See also Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 765, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998); *Faragher v. City of Boca Raton,* 524 U.S. 775, 799, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998).

Even though the district court erred in instructing the jury that Browning was not Smith's supervisor, this court will not reverse the judgment and remand for a new trial unless the error was prejudicial. *See Doering,* 259 F.3d at 1212. If the jury found Browning to be Smith's supervisor, the jury could have found the City liable on Smith's hostile work environment claim premised on a theory of vicarious liability. *See Burlington,* 524 U.S. at 765; *Faragher,* 524 U.S. at 799. Because the jury was instructed that Browning was not Smith's supervisor, however, the jury could only have found the City liable for Browning's harassment if it also found that the City knew, or should have known, of Browning's harassment. *See Wright-Simmons,* 155 F.3d at 1270. Therefore, because the district court's instruction limited the theories of liability for Smith's hostile work environment claim, the instruction prejudiced Smith.[3] Accordingly, the district court erred in denying Smith's

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[3] The district court instructed the jury on Smith's constructive discharge claim as follows:

> In connection with her claim for hostile work environment sexual harassment, the Plaintiff claims that she was constructively discharged. In order to recover damages for constructive discharge, the Plaintiff must establish her claim for hostile work environment sexual harassment, as explained in the preceding instructions, and, in addition; must prove that the Plaintiff's working conditions were so intolerable that any reasonable person, under the same circumstances, would feel forced to resign.
>
> Under the jury instructions, Smith's constructive discharge claim was conditioned on her ability to prove a hostile work environment claim. Accordingly, the district court's erroneous instruction also prejudiced Smith with respect to her constructive discharge claim.

motion for a new trial on Smith's hostile work environment claim.

With respect to Smith's retaliation claim, the determination of whether Browning was a supervisor does not affect the issue of liability. Smith alleged that the City retaliated against her after she filed charges with the Equal Employment Opportunity Commission (EEOC) on August 28, 1998, and on February 3, 1999 by transferring her from the K-9 unit and constructively discharging her. Browning, however, ceased training Smith on April 18, 1995. Accordingly, although the district court erred in instructing the jury that Browning was not Smith's supervisor, the instruction was not prejudicial as to Smith's retaliation claim.

B. The City's training videotape

When the issue of whether to grant a new trial "hinges on the admissibility of evidence," this court reviews the "admission of the evidence for abuse of discretion." *Sanjuan v. IBP, Inc.*, 160 F.3d 1291, 1296 (10th Cir.1998). If the evidence was erroneously admitted, this court "will set aside a jury verdict only if the error prejudicially affects a substantial right of a party." *Id.* Further, "[e]vidence admitted in error can only be prejudicial if it can be reasonably concluded that . . . without such evidence, there would have been a contrary result." *Id.* (internal quotation omitted).

Smith argues that the district court erred in admitting the City's training videotape into evidence because the City failed to produce the videotape in discovery and failed to list the videotape as an exhibit in the pretrial order. At trial, Smith and Loudermilk testified that the

City showed a videotape in an ethics training class which depicted an officer and a confidential informant engaging in sexual acts. In response to this testimony, the City introduced the original training videotape and the testimony of Boshell to show the absence of any depiction of sexual acts.

The district court admitted the City's videotape and Boshell's testimony as rebuttal evidence. While the district court noted that the City's videotape was not listed as an exhibit in the pretrial order, the district court reasoned that Smith was not unfairly prejudiced by the introduction of either the videotape or Boshell's testimony. Specifically, the district court noted that the City had previously filed Boshell's affidavit concerning the content of the City's videotape in support of its motion for summary judgment.

Because Boshell's testimony and the City's videotape served only to rebut Smith's and Loudermilk's testimony, Smith was not unfairly prejudiced by the admission of the City's videotape or Boshell's testimony. *See Roberts v. Roadway Express, Inc.*, 149 F.3d 1098, 1108 (10th Cir.1998) (holding that the plaintiff was not unfairly prejudiced by the admission of the testimony of two rebuttal witnesses); *Burks v. Oklahoma Publ'g Co.*, 81 F.3d 975, 980 (10th Cir.1996) (stating that a rebuttal witness need not be listed as a witness in the pretrial order to be permitted to testify); *Canady v. J.B. Hunt Transp., Inc.*, 970 F.2d 710, 716 (10th Cir.1992) (holding that the introduction of testimony that was purely rebuttal was not an abuse of discretion). Accordingly, the district court did not abuse its discretion in admitting the City's videotape and Boshell's testimony.

Smith also argues that the City's videotape should have been excluded under Title III of the Omnibus Crime

Control and Safe Streets Act, 18 U.S.C. §§ 2510 – 2522, ("Title III"). Title III prohibits the use of "any wire or oral communication [that] has been intercepted" as "evidence in any trial, hearing, or other proceeding in or before any court . . . if the disclosure of that information would be in violation of [Title III]." *Id.* § 2515. Only an "aggrieved person," however, has standing to challenge the legality of intercepted communications under Title III. *In re Berry,* 521 F.2d 179, 185 (10th Cir.1975) (holding that the "[w]itness has not shown that he was a party to any intercepted wire or oral communication or a person against whom the interception was directed. Hence, he was not an aggrieved person and has no standing to raise the claim of illegal surveillance."); 18 U.S.C. §§ 2510(11), 2515. An "aggrieved person" under Title III is "a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed." 18 U.S.C. § 2510(11). Smith was not a party to the City's videotape. Moreover, she was not a person "against whom the interception was directed." *See id.* Accordingly, Smith is not an "aggrieved person" and lacks standing to challenge the legality of the City's videotape under Title III. *See Berry,* 521 F.2d at 185.

IV. CONCLUSION

For the reasons stated above, this court **affirms in part** and **reverses in part** the district court's denial of Smith's motion for new trial. The case is **remanded** to the district court for a new trial on Smith's hostile work environment and constructive discharge claims in accordance with this opinion.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

SHAUNA E. SMITH,	)	
Plaintiff,	)	
vs.	)	Case No. CIV-99-1842-R
THE CITY OF OKLAHOMA CITY,	)	
Defendant.	)	

ORDER

(Filed Jul. 12, 2001)

Before the Court is the Plaintiff's Motion for New Trial.

I. Supervisory Status of Sergeant Don Browning.

The Plaintiff first argues that the Court's instruction to the jury that Sergeant Don Browning was not the Plaintiff's supervisor constitutes reversible error. During the course of the trial, after hearing the Plaintiff's evidence on the matter, the Court advised counsel that it would instruct jury that Sergeant Browning was not considered to be the Plaintiff's supervisor.[1] Thereafter,

[1] The parties have referred in their briefs to the Court's "instructions" (plural) regarding Sergeant Browning. The Court's review of the record shows that following the presentation of the Plaintiff's evidence, the court advised counsel that it intended to instruct the jury that Sergeant Browning was not a supervisor. This discussion took place outside the hearing of the jury. When the final jury instructions were read to the jury, only the one quoted above, referred to Sergeant

(Continued on following page)

at the conclusion of the trial, the Court instructed the jury in pertinent part as follows:

> "With regard to the Sixth element identified above, the basis for imposing liability upon an employer depends upon whether the alleged harassment creating the hostile work environment is committed by a supervisor or by a co-worker. When the source of the alleged harassment is a co-worker, the Plaintiff must demonstrate either that the employer failed to provide a reasonable avenue for complaint, or that management-level employees knew or should have known about the harassment, yet failed to take appropriate remedial action. "Management level employees" are defined as those supervisors who possessed substantial authority over the terms and conditions of the harasser's or the harassee's employment, such as the ability to hire, promote, discharge or discipline. The Court has determined that Sgt. Don Browning was not a management level employee.
>
> When the sexually hostile work environment is created by the actions of a supervisor, the employer is liable unless the employer meets the elements of the affirmative defense described in the following Instruction."

Browning. As the Defendant points out, the Plaintiff has neither quoted nor cited to the particular page of the transcript in which this instruction was discussed, but the Court recalls that Plaintiff's counsel did object to this instruction for basically the same reasons urged in this Motion.

The Plaintiff argues that whether an employee is a supervisor is a question of fact for the jury. Whether an individual is a supervisor or a management level employee is a question of fact in many instances, but only where the evidence is conflicting in that regard. *See, e.g., Bullman v. Penske Truck Leasing Co., I.P.*, 2000 WL 943877, fn. 10 (S.D. Ind. 2000) (Plaintiff's identification of two individuals as "supervisors" or "acting supervisors" fails to create an issue of fact whether they were "supervisors" for Title VII purposes, where there was no evidence that such individuals had the authority to hire, fire, or otherwise alter the plaintiff's employment status).

Sergeant Browning testified that he was assigned as the Plaintiff's canine trainer for only about three months in early 1995. At that time, the Plaintiff's supervisor was Lieutenant L. D. Allen. Sergeant Browning testified that his primary function at that time was to "take the new [officer/dog] teams through a training program." (Defendant's Exhibit "A," p. 151). Sergeant Browning testified that he did not have a supervisory role, but merely conducted training for a limited period of time.[2] Sergeant Browning would submit the proposed training schedule to the trainees' supervisors, who would approve the training schedule (Exhibit "A," p. [sic] pp. 156-157). Sergeant Browning testified that any variations from the approved training schedule likewise required the approval of the trainee officer's supervisor. Sergeant Browning had no involvement with the Plaintiff's performance evaluations, and no authority to

[2] Sergeant Browning testified that he was the Plaintiff's trainer for only about three months in 1995.

impose discipline for misconduct. (Defendant's Exhibit "A", pp. 199-200). The Defendant also offered evidence that the Collective Bargaining Agreement between the Defendant City and the Fraternal Order of the Police provides that the position of sergeant is not a supervisory rank.

The Plaintiff cites *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997), *cert. denied and jgmt vacated by Eddy Potash, Inc. v. Harrison*, 524 U.S. 947, 118 S. Ct. 2364, 141 L. Ed. 2d 732 (1998) for the proposition that the collective bargaining agreement "does not establish whether a sergeant is or is not a supervisor in a Title VII action." The Tenth Circuit's now-vacated *Harrison* opinion does not support this proposition; rather, it holds that an employee did not have to exhaust the grievance procedures contained in a collective bargaining agreement before suing her employer for hostile work environment sexual harassment.[3]

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[3] The Plaintiff points out that the Court treated Sergeant Browning as a supervisory employee for purposes of the Defendant's summary judgment motion. In denying the Defendant's motion, the Court noted that Sergeant Browning oversaw the Plaintiff's canine training, and that he was a higher-ranking officer in a quasi-military organization. Thus, for purposes of that motion only, the Court treated Sergeant Browning as "having some level of supervisory authority over the Plaintiff" during the period in which she reported to him as her training officer. At trial, it developed that Sergeant Browning oversaw the Plaintiff's training one evening a week for a brief period of time in 1995, that the Plaintiff reported to another supervisor, and that Sergeant Browning had no authority over the Plaintiff in the critical areas of hiring, promotion, demotion, discipline or termination. By the time the Plaintiff rested her case, there was no genuine factual dispute as to Sergeant Browning's non-supervisory status.

The Plaintiff's argument that Sergeant Browning was a supervisor is based upon the theory that Sergeant Browning gave trainees "orders" under a delegation of authority from the Chief of Police. The Plaintiff points Sergeant Browning's cross-examination testimony in which he acknowledged that he "set the order of how training was conducted," and that the trainees, including the Plaintiff, "were expected to follow [his] orders." Defendant's Exhibit "A," p. 161. In his cross-examination testimony Sergeant Browning agreed that he was "the manager of K-9 training at Oklahoma City," that he "had the responsibility for taking care of dogs, overseeing that the officers met their training on Wednesday night and that the officers were qualified and the dogs were qualified." *Id.* The Plaintiff quotes Sergeant Browning's affirmative answers to counsel's leading questions as to whether the Plaintiff was "his to train," and whether he told the Plaintiff what to do to train the dog.

Obviously the Plaintiff's evidence establishes that Sergeant Browning conducted canine training for the officers assigned to him, and that he was the Plaintiff's trainer for a period of time. However, the fact that he was responsible for one aspect of the Plaintiff's training – dog handling – at one period of time does not make Sergeant Browning the Plaintiff's supervisor. The Defendant has established that Sergeant Browning was neither officially recognized as nor unofficially regarded as the Plaintiff's supervisor within the departmental structure. The Plaintiff's evidence, viewed in its most favorable light, fails to show that Sergeant Browning had any authority to make important personnel decisions regarding the Plaintiff such as hiring, promotion, demotion, discipline, termination or work assignments. Nor does the Plaintiff's evidence show

that Sergeant Browning had the capacity to make recommendations with regard to these decisions, or that he participated in any such decisions. *See Gunnell v. Utah Valley State College*, 152 F. 3d 1253 (10th Cir. 1998). Sergeant Browning was clearly not a supervisor, nor did he hold the apparent authority of a supervisor. The Plaintiff is not entitled to a new trial based on the instruction concerning Sergeant Browning.

II. Complexity and Confusion of the Jury Instructions

The Plaintiff next seeks a new trial on the ground that the written jury instructions were overly complex, lengthy and confusing. The only area of "confusion" the Plaintiff specifically identifies is that with regard to the supervisory status of Sergeant Don Browning, which the Court has addressed at length above. The Court finds that the jury instructions are neither unduly long nor confusing in light of the nature of the trial, which was both lengthy and vigorously contested. Moreover, the Plaintiff did not object to the instructions on the basis of length, complexity or confusion at trial, and thus is not entitled to a new trial on this basis. Rule 51, Fed. R. Civ. Pro.

IV. Admission of Original Eric Muse Videotape

The Plaintiff next seeks a new trial on the ground that admission of Defendant's Exhibit 309 was erroneous. The Plaintiff alleges that in response to her initial discovery requests, city officials provided several commercially produced videotapes on the topic of sexual harassment,

but did not produce the "Eric Muse" videotape. Following the deposition of Dianna Berry, personnel director for the City of Oklahoma City,[4] the City produced the version of the Eric Muse videotape identified at trial as Plaintiff's Exhibit 835. The Plaintiff contends that this version of the tape was edited; and further contends defense counsel denied that the tape had been edited and assured her that it was the original. (Plaintiff's brief, p. 7). At trial, the Plaintiff and other witnesses testified at some length during the Plaintiff's case in chief about the contents of the videotape shown at the ethics training session, testifying that the tape shown in the seminar depicted sexually explicit behavior between Officer Eric Muse and a female confidential informant. At the end of its case, the Defendant called Captain Byron Boshell, who testified concerning that the contents of the videotape. Through Captain Boshell's testimony, the Defendant offered its Exhibit 309, the original surveillance tape depicting the sting operation involving Officer Eric Muse, which was admitted over the Plaintiff's objection. The original videotape contained no depiction of sexually explicit behavior of any kind.

The Plaintiff argues that the admission of Defendant's Exhibit 309 was error for two primary reasons: First, the Plaintiff argues that Bryon Boshell's testimony concerning the videotape was beyond the scope of the proposed testimony identified in the Final Pretrial Report. Second, the Plaintiff contends that the Defendant "failed to produce the [original] videotape during discovery, and, more importantly, intentionally omitted the videotape from its

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[4] Ms. Berry is the wife of Oklahoma City Police Chief M. T. Berry.

exhibit list in the pretrial order." (Plaintiff's brief, p. 10). The Plaintiff contends that the videotape was not offered as rebuttal evidence, and thus, its admission was unfairly prejudicial.

The court rejects the Plaintiff's arguments for essentially the same reasons explained at trial. Contrary to the Plaintiff's argument, the videotape, which was identified by Captain Boshell as the original videotape of the Eric Muse sting operation, was in fact offered to rebut the Plaintiff's evidence that: 1) the excerpt shown to a group of police officers at the training session she attended contained such graphic, sexually offensive content that showing it constituted sexual harassment; and 2) that the Defendant or its attorneys had edited the videotape produced during this litigation to conceal its graphic, sexual content. Such evidence clearly is in the nature of rebuttal, and may be excluded if its probative value is outweighed by unfair prejudice to the party opposing it, even if it is not listed on the pretrial report. *Roberts v. Roadway Express, Inc.*, 149 F. 3d 1098, (10th Cir. 1998); *Burks v. Oklahoma Publishing Co.*, 81 F. 3d 975, 980 (10th Cir. 1996) (Rebuttal witnesses may be called regardless of whether they are listed in the pretrial order); *Canady v. J. B. Hunt Transport Co.*, 970 F. 2d 710 (10th Cir. 1992) (Testimony from co-worker in worker's compensation retaliation case did not warrant granting of new trial on ground of unfair surprise where it did not go beyond testimony elicited from the employer's witnesses and was purely rebuttal); *Grove Fresh Distributors, Inc. v. New England Apple Products Co.*, 969 F. 2d 552, 559-560 (7th Cir. 1992) (No unfair prejudice in allowing witness not listed in pretrial order because testimony was carefully limited to rebuttal topics). *But see Joseph v. Terminix*

International Co., 17 F. 3d 1282 (10th Cir. 1994) (Trial court did not abuse its discretion in excluding evidence the plaintiff sought to introduce just before close of defendant's case where its probative value was substantially outweighed by the danger of unfair prejudice).

The Plaintiff's claim that she was "surprised" by Captain Boshell's testimony, and by the content of the videotape, is without merit. In its reply brief filed in support of its summary judgment motion, the Defendant attached Captain Boshell's affidavit, which recited that the original videotape of Eric Muse "does not include sex or oral sex between the parties." In this case the Plaintiff was prejudiced by the introduction of the original videotape only because it effectively refuted her testimony that the excerpt she saw contained graphic depictions of sexual behavior, and her suggestion that the Defendant had edited the tape to conceal this fact. Any prejudice the Plaintiff suffered in that regard may not be characterized as unfair. Fundamental fairness required that the Defendant be permitted to refute the Plaintiff's testimony as to the content of the videotape. The object of any trial is, after all, a search for the truth. *Accord, Sims v. ANR Freight System, Inc.*, 77 F. 3d 846, 849 (5th Cir. 1996).

The Plaintiff makes a generalized objection to the "circumstances of the jury's viewing of the tape in the presence of the courtroom deputy." The Plaintiff has not explained how allowing the jury to view the videotape in the presence of the courtroom deputy constitutes error, nor has she shown that she was unfairly prejudiced thereby.

V. Violation of Title III.

The Plaintiff next argues that the introduction of Defendant's Exhibit 309 violates Title III of the Omnibus Crime Control and Safe Streets Act, Title 18 U.S.C. § 2510, *et seq.* Among other things, Title III governs the interception and recording of communications and conversations, and the use of evidence derived from such recordings. See Title 18 U.S.C. § 2518(8)(a). Title III provides a civil right of action for any person whose oral communication is disclosed or intentionally used in violation of its provisions. Title 18 U.S.C. § 2520. The Plaintiff alleges that the Defendant City "deliberately ignored" Title III during its investigation of former Officer Eric Muse, because no warrant was issued for the placement of the camera in the motel room prior to interception of his conversation with the female informant, and because no application was made for the release and disclosure of the videotape by the City of Oklahoma City for use in its training program. The Plaintiff has submitted an affidavit from Eric Muse averring that he never received notice of the use and disclosure of the videotape either in the training session or in this litigation.

The Defendant contends that the Plaintiff has no standing to object to the surreptitious videotaping of Eric Muse and the informant, or to the release and disclosure of the videotape. The Court agrees. The Plaintiff does not appear on the videotape, does not claim that she was present when it was made, and does not claim that any oral communications to or from her were depicted on the videotape. Nor does the Plaintiff claim to have a privacy interest in the premises on which the tape was made. *See United States v. Scafidi*, 564 F. 2d 633 (2nd Cir. 1977), *cert. denied*, 463 U.S. 903, 98 S. Ct. 2231, 56 L. Ed. 2d 401

(1978); *United States v. McVeigh*, 896 F. Supp. 1549, fn. 4 (W. D. Okla. 1995) (Criminal defendant had no standing to raise challenges under Title III to interceptions of third party conversations occurring on premises in which he has no reasonable expectation of privacy). The Plaintiff is not entitled to a new trial on this basis.

VI. Sufficiency and Weight of the Evidence

Finally, the Plaintiff argues that the jury's verdict is against the weight of the evidence. The Court has carefully considered the evidence in this case. While there was evidence of embarrassingly unprofessional conduct on the part of some individuals employed by the Oklahoma City Police Department, the extent to which supervisory or management-level employees were aware or should have been aware of such conduct was highly disputed at trial. A reasonable factfinder could have resolved this dispute in favor of the Defendant. The Plaintiff has not shown that the verdict was against the clear weight of the evidence, or that a new trial is necessary to prevent miscarriage of justice. The jury's verdict was not "clearly, decidedly, or overwhelmingly" against the weight of the evidence *See Brown v. McGraw Edison Co.*, 736 F. 2d 609 (10th Cir. 1984). The Plaintiff is not entitled to a new trial on this basis.

VII. Conclusion

The Plaintiff's Motion for New Trial is hereby DENIED.

IT IS SO ORDERED this 12th day of July, 2001.

/s/ David L. Russell
DAVID L. RUSSELL
Chief United States
District Judge

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SHAUNA E. SMITH,

Plaintiff-Appellant,

v.

CITY OF OKLAHOMA CITY,

Defendant-Appellee,

and

L. D. ALLEN; DON BROWNING; PAUL BURLEY; THOMAS HART; MIKE HEATH; DALE MARSHALL; BILLY PRATT; NATHAN PYLE; DARREN RAINES; DAVID SHUPE; MARTY STUPKA; MIKE WILLIAMS,

Defendants.

No. 01-6307

ORDER

Filed May 13, 2003

Before **SEYMOUR, McKAY** and **MURPHY**, Circuit Judges.

Appellee's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in

regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER,
Clerk of Court

by: /s/ Lisa Gallegos
Deputy Clerk

PLAINTIFF'S EXHIBIT
596
CIV-99-1842-R

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; See Privacy Act Statement before completing this form.

AGENCY
☐ FEPA ☒ EEOC

CHARGE NUMBER 311981061

Oklahoma Human Rights Commission and EEOC
State or local agency, if any

NAME *(Indicate Mr., Ms., Mrs.)*
Ms. Shauna E. Smith

HOME TELEPHONE *(Include Area Code)*
(405) 789-6620

STREET ADDRESS
8125 N.W. 11th,

CITY, STATE AND ZIP CODE
Oklahoma City, OK 73127

DATE OF BIRTH 10/10/59

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME *(If more than one list below.)*

NAME Oklahoma City Police Department

NUMBER OF EMPLOYEES, MEMBERS
Cat A (15-100)

TELEPHONE *(Include Area Code)*
(405) 297-1000

STREET ADDRESS
200 North Shartel,

CITY, STATE AND ZIP CODE
Oklahoma City, OK 73142

COUNTY 109

NAME TELEPHONE NUMBER *(Include Area Code)*
STREET ADDRESS CITY, STATE AND ZIP CODE
COUNTY

CAUSE OF DISCRIMINATION BASED ON *(Check appropriate box(es))*

☐ RACE ☐ COLOR ☒ SEX
☐ RELIGION ☐ NATIONAL ORIGIN
☒ RETALIATION ☐ AGE
☐ DISABILITY ☐ OTHER *(Specify)*

DATE DISCRIMINATION TOOK PLACE

EARLIEST	*LATEST*
05/27/98	08/28/98

☐ CONTINUING ACTION

THE PARTICULARS ARE *(If additional space is needed, attach extra sheet(s)):*

I. During my employment, I have been subjected to continuing acts of discriminatory acts of harassment, unwarranted disciplinary action and unequal terms and conditions of employment than that of males. The most recent date of discrimination took place on or about May 27, 1998.

II. Department officials have failed to acknowledge and take immediate appropriate corrective action in the matter at hand.

III. I believe that I was discriminated against in violation of Title VII of the Civil Rights Act of 1964, as amended, by being subjected to harassment, unwarranted disciplinary action, and unequal terms and conditions of my employment, because of my sex, Female.

☐ I want this charge filed with both the EEOC and the state or local agency, if any. I will advise the agencies if I change my address or telephone number and cooperate

fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty or perjury that the foregoing is true and correct.

Dated 8-28-98 /s/ Shauna Smith
Charging Party *(Signature)*

NOTARY – (When necessary for State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT
SUBSCRIBED AND SWORN TO BEFORE
(Day, month, and year)

OKLAHOMA CITY POLICE DEPARTMENT

CLASS III REPRIMAND

EMPLOYEE:	Shauna Smith	*Smith v. OKC* CIV-99-1842-R Defendant's Ex. #26
DEPARTMENT:	Police	
JOB TITLE:	Sergeant	
DATE:	January 26, 1999	

OTHER DISCIPLINARY ACTION TAKEN: Oral Counselings (10-22-97 and 11-12-97), Class I Reprimand (5-18-98), Class II Reprimand (11-09-98)

NOTE: Give specific details of incident.

The following is presented for a record of a CLASS III REPRIMAND involving the above-named employee:

On October 22, 1997, you received an oral counseling for failing to notify the K-9 supervisor that you would not be attending scheduled training conducted on October 15, 1997. Again on November 12, 1997, you received a second oral counseling for failing to notify the K-9 supervisor that you would be late for training scheduled for November 12, 1997. You were advised you would receive more severe discipline if you failed to comply with related policies and procedures in the future.

On May 18, 1998, you received a Class I Reprimand for violating Procedure 117.10 TARDINESS, Departmental Rule 260.0 REPORTING FOR DUTY, Departmental Procedure 117.04 REPORTING FOR DUTY, Departmental Policy 240.0 COMPLIANCE WITH LAWFUL ORDERS, and Departmental Rule 175.0 COMPLIANCE OF ORDERS as a result of your failure to notify the K-9 supervisor that you would be late for training on March 18, 1998, as previously ordered. You were advised future violations of these procedure and rules would result in further and more severe discipline.

On October 14, 1998, you received an oral counseling relating to incomplete and inaccurate activity report forms you submitted for the month of September 1998. You were ordered to correct and resubmit September's activity report form before the end of your shift. You failed to correct and resubmit the requested form as ordered.

On November 9, 1998, you received a Class II Reprimand for violating Police Department Policy 240.0 COMPLIANCE WITH LAWFUL ORDERS and Police Department Rule 175.0 COMPLIANCE WITH ORDERS as a direct result of your failure to comply with the order given on October 14, 1998. You were again ordered to correct your

September activity and submit it by November 11, 1998. You were advised future violations of the cited policies and rules would result in more severe discipline.

On December 9, 1998, you failed to personally notify the K-9 supervisor that you would be late for training as previously ordered by Lt. Nathan Pyle, Captain Larry Koonce and Major David Shupe. You argued with Lt. Pyle regarding who should be designated as the on-call K-9 Unit and did not return to your primary duty location after being notified you were not the on-call officer. You called the Watch Commander rather than Captain Koonce regarding the incident in direct violation of a direct order previously issued to you by Major David Shupe outlining your chain of command. You also have not furnished a correct copy of your September activity to the K-9 supervisor as ordered.

On January 20, 1999, a Departmental Review Board Hearing was convened to review evidence and to determine findings of fact concerning allegations of violations of Departmental Policy. The Board determined you violated Departmental Rule 175.0 COMPLIANCE OF ORDERS, which reads in part, "An employee must comply with all lawful orders, however received. The employee shall be held responsible for complying with the last and most recent order received", Departmental Rule 180.0 INSUBORDINATION, which reads in part, "Insubordination shall include, but not be limited to, any failure or deliberate refusal to obey a lawful order given by a superior . . . ", and in violation of Departmental Policy 240.0 COMPLIANCE WITH LAWFUL ORDERS, which reads in part, "If there is a willful disregard of lawful orders, commands, or directives or policies, retraining of personnel and/or disciplinary action will occur."

As a result of the Board's finding, you are receiving this Class III Reprimand and an involuntary transfer out of the K-9 Unit. You are directed to comply with the cited Departmental Rules and Policies in the future. Your failure to comply with this order would constitute a deliberate refusal to obey a lawful order and result in more severe discipline, up to and including termination.

If you are experiencing problems of a personal nature, please be advised that the City of Oklahoma City has an Employee Assistance Program (EAP), and that program services [sic] available to you. You may obtain confidential referral material by contacting the City Personnel Department.

/s/ Shauna Smith	/s/ Mike Heath
EMPLOYEE	BUREAU COMMANDER
/s/ Nathan Pyle	M.T. Berry
IMMEDIATE SUPERVISOR	DEPARTMENT HEAD
/s/ David Shupe	
DIVISION COMMANDER	

(Attach any official report regarding this matter)
cc: OCPD Personnel/Bureau File/Employee

PLAINTIFF'S EXHIBIT
597
CIV-99-1842-R

CHARGE OF DISCRIMINATION

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AGENCY
☐ FEPA ☒ EEOC

CHARGE NUMBER 311990374

Oklahoma Human Rights Commission and EEOC
State or local agency, if any

NAME *(Indicate Mr., Ms., Mrs.)*
Ms. Shauna E. Smith

HOME TELEPHONE *(Include Area Code)*
(405) 789-6620

STREET ADDRESS CITY, STATE AND ZIP CODE
8125 N.W. 11th, Oklahoma City, OK 73127

DATE OF BIRTH 10/10/1959

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME *(If more than one list below.)*

NAME Oklahoma City Police Department

NUMBER OF EMPLOYEES, MEMBERS
CAT C (201-500)

TELEPHONE *(Include Area Code)*
(405) 297-1000

STREET ADDRESS CITY, STATE AND ZIP CODE
200 North Shartel, Oklahoma City, OK 73142
COUNTY 109

NAME TELEPHONE NUMBER *(Include Area Code)*
STREET ADDRESS CITY, STATE AND ZIP CODE
COUNTY

CAUSE OF DISCRIMINATION BASED ON *(Check appropriate box(es))*

☐ RACE ☐ COLOR ☐ SEX
☐ RELIGION ☐ NATIONAL ORIGIN
☒ RETALIATION ☐ AGE
☐ DISABILITY ☐ OTHER *(Specify)*

DATE DISCRIMINATION TOOK PLACE

EARLIEST	*LATEST*
01/29/1999	01/29/1999

☐ CONTINUING ACTION

THE PARTICULARS ARE *(If additional space is needed, attach extra sheet(s)):*

I. On August 28, 1998, I filed a charge of employment discrimination against the department. I was subsequently retaliated against by being subjected to a hostile work environment, a barrage of harassing actions taken against me without justification, and unwarranted disciplinary actions along with a disciplinary transfer effective January 29, 1999.

II. Immediate and appropriate corrective action was not taken by by [sic] department officials as required. Department officials unlawfully asserted that the disciplinary actions and transfer was based on failure on my part to comply with orders, insubordination, and other unsubstantiated conduct issues.

III. I believe that I was discriminated against in violation of Title VII of the Civil Rights Act of 1964, as amended, by being subjected [sic] a hostile work environment, harassment, disciplinary actions, and a disciplinary transfer, for having filed a previous charge of employment discrimination.

☐ I want this charge filed with both the EEOC and the state or local agency, if any. I will advise the agencies if I change my address or telephone number and cooperate

fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty or perjury that the foregoing is true and correct.

Dated 2-3-99 /s/ Shauna Smith
Charging Party *(Signature)*

NOTARY – (When necessary for State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT
SUBSCRIBED AND SWORN TO BEFORE
(Day, month, and year)

INSTRUCTION NO. ___

CLAIM FOR SEXUAL HARASSMENT – HOSTILE WORK ENVIRONMENT – ESSENTIAL ELEMENTS

In order to establish her claim for hostile work environment sexual harassment under Title VII, the Plaintiff must prove by a preponderance of the evidence each of the following essential elements:

First: That she is a member of a group protected by Title VII, i.e., female;

Second: That she was subjected to unwelcome sexual harassment during the period of November 1, 1997 through February 3, 1999;

Third: That the harassment was based upon the Plaintiff's sex;

Fourth: That the harassment was so pervasive or severe that a reasonable person of the same gender in the same position as the Plaintiff would find the conditions of the Plaintiff's employment to be altered and the work environment to be sexually hostile or abusive;

Fifth: That as a result of the harassment, the Plaintiff subjectively perceived that the conditions of her employment had been altered and that her work environment was sexually hostile or abusive; and

Sixth: That a specific basis exists for imputing the conduct that created the hostile work environment to the Defendant City.

With regard to the Second element, you are instructed that conduct is considered to be unwelcome if the Plaintiff did not solicit or invite it and if the employee considered the conduct to be undesirable or offensive.

With regard to the Fourth and Fifth elements, in determining whether a work environment is objectively hostile or abusive, you should consider the "totality of the circumstances," including the context in which the alleged comments were made or conduct occurred. Specifically, you should consider such factors as the frequency of the alleged gender-based harassment or sexually offensive conduct, its severity, whether it was physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interfered with the Plaintiff's work performance. A work environment need not seriously affect an employee's psychological well-being or impair an employee's work performance to be reasonably perceived as sexually hostile or abusive. No single factor is required. These are simply factors that you should consider in determining whether on balance the Plaintiff was subjected to harassment that was sufficiently severe or pervasive to alter the conditions of her employment and to create a sexually hostile or abusive work environment.

The Plaintiff must show, based on the foregoing elements, that a hostile work environment existed during the period from November 1, 1997 to February 3, 1999. Incidents of alleged harassment occurring prior to November 1, 1997 may be considered as part of the Plaintiff's hostile work environment claim if they are part of a continuing pattern of discriminatory harassment. Incidents occurring after the Plaintiff filed her second charge of discrimination with the Equal Employment Opportunity Commission on February 3, 1999 may be considered as

part of the Plaintiff's hostile work environment claim if they are reasonably related to the claims asserted in the Plaintiff's EEOC charge.

With regard to the Sixth element identified above, the basis for imposing liability upon an employer depends upon whether the alleged harassment creating the hostile work environment is committed by a supervisor or by a co-worker. When the source of the alleged harassment is a co-worker, the Plaintiff must demonstrate either that the employer failed to provide a reasonable avenue for complaint, or that management-level employees knew or should have known about the harassment, yet failed to take appropriate remedial action. "Management level employees" are defined as those supervisors who possessed substantial authority over the terms and conditions of the harasser's or the harassee's employment, such as the ability to hire, promote, discharge or discipline. The Court has determined that Sgt. Don Browning was not a management level employee.

When the sexually hostile work environment is created by the actions of a supervisor, the employer is liable unless the employer meets the elements of the affirmative defense described in the following Instruction.

INSTRUCTION NO. ___

TANGIBLE JOB ACTION/AFFIRMATIVE DEFENSE TO HOSTILE WORK ENVIRONMENT CLAIM

An employer is presumed to be on notice of sexual harassment committed by a supervisor if the harassment results in a tangible employment action. Examples of

"tangible employment action" include hiring and firing; promotion and failure to promote; demotion; undesirable reassignment or transfer; or a decision causing a significant change in employment benefits. If you find that the Plaintiff was subject to sexual harassment creating a hostile work environment by her supervisor(s) *and* that the supervisor's harassment culminated or resulted in a tangible employment action, then you should not consider the Defendant's affirmative defense to the Plaintiff's claim for a hostile work environment. However, if you find that the Plaintiff was subjected to sexual harassment creating a hostile work environment by her supervisor(s) *but* that the supervisor's harassment did not culminate or result in any tangible employment action taken against the Plaintiff, then you must consider the Defendant's affirmative defense to the hostile work environment claim. The Defendant is liable on the sexual harassment/hostile work environment claim if you find that the Plaintiff has proved by a preponderance of the evidence each of the essential elements of that claim unless the Defendant proves by a preponderance of the evidence each of the following essential elements of its affirmative defense to that claim:

First: That the Defendant exercised reasonable care to prevent and promptly correct any harassing behavior; and

Second: That the Plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the Defendant, or to avoid harm otherwise.

INSTRUCTION NO. ___

HOSTILE WORK ENVIRONMENT/CONSTRUCTIVE DISCHARGE

In connection with her claim for hostile work environment sexual harassment, the Plaintiff claims that she was constructively discharged. In order to recover damages for constructive discharge, the Plaintiff must establish her claim for hostile work environment sexual harassment, as explained in the preceding instructions, and, in addition; must prove that the Plaintiff's working conditions were so intolerable that any reasonable person, under the same circumstances, would feel forced to resign.

Supreme U. S.
F I L
SEP 1 1 2003
OFFICE OF THE CLERK

No. 03-222

In The

Supreme Court of the United States

CITY OF OKLAHOMA CITY,

Petitioner,

v.

SHAUNA E. SMITH,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

PARTIES TO THE PROCEEDINGS

All parties are listed in the caption. Petitioner, The City of Oklahoma City, a municipal corporation and charter city of the first class organized pursuant to the laws of the State of Oklahoma, will be referred to as "Petitioner" or "City." Respondent, Shauna E. Smith, will be referred to as "Respondent" or "Smith."

The initial case filing included the following individually named defendants: L.D. Allen; Don Browning; Paul Burley; Thomas Hart; Mike Heath; Dale Marshall; Billy Pratt; Nathan Pyle; Darren Raines; David Shupe; Marty Stupka; and Mike Williams. The trial court granted the individual motions to dismiss these defendants. There was no appeal by Smith as to these dismissed individual defendants; therefore; they are not parties to this proceeding.

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STATEMENT OF THE CASE

Respondent Smith was hired as a police officer with the Petitioner City of Oklahoma City (the "City") in September 1989, and the City promoted her to the position of canine officer in December 1994. In a plot to discourage her, Sgt. Don Browning, the canine trainer, paired Ms. Smith with "Ex," the crazy dog. Ms. Smith successfully trained and qualified with her canine partner and was assigned to the Hefner Patrol Division where she endured a constant stream of uninvited lewd comments, physical contact, and pretextual discipline devised to run her off.

In June 1998, she complained of sexual harassment and filed a grievance with the Fraternal Order of Police ("FOP"), which was denied. Ms. Smith filed two EEOC charges in August 1998 and February 1999, respectively. Ms. Smith quit the police department November 16, 1999, and on November 24, 1999, sued the City for sexual harassment, hostile workplace, retaliation, and constructive discharge under Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000, et seq.).

In an order denying the City's motion for summary judgment on the issue of the supervisory status of K-9 trainer Don Browning, the court stated that it considered Sgt. Browning a higher-ranking officer with some level of supervisory authority over Ms. Smith.

A jury trial was held April 12-20, 2001, and the jury returned a unanimous verdict against Smith.

STATEMENT OF THE FACTS

While training in the police academy, Smith knew that she wanted to become a K-9 officer. Smith was assigned to work in the IMPACT unit of the police department in 1993, and her supervisor at that time was Bob Horn. Mr. Horn testified that Ms. Smith did an excelient job, was passionate about her job, and received commendations from FBI Director, Louis Freeh, and other agencies.

In December 1994, the City promoted Smith to the position of K-9 officer, and she started her K-9 training in January 1995 at the K-9/Equine Center located north of the Canadian River at 14th and Portland in Oklahoma City. Smith was the only female K-9 officer. From January 1995 to April 18, 1995, Sgt. Browning trained Ms. Smith and he told her how to train her dog – he gave her a schedule, and told her what to do on a daily basis. During her training period as a K-9 officer, Sgt. Browning was responsible for maintaining the K-9 facility and kennels, and he had sole responsibility for Ms. Smith's one-on-one training,

In December 1994, G.W. Davis, who worked as a mounted patrol officer with the City police department for fifteen years, overheard Don Browning tell Lt. Pyle and Lt. Allen: "Not to worry about it . . . the cunt can't handle that crazy dog. He'll eat her up and she'll be out of here and she'll be off K-9." Don Browning was the head K-9 trainer and supervisor in K-9. Don Browning was responsible for assigning the dog Ex to Ms. Smith. V. VI., p. 1673. Ms. Smith was only the second or third female K-9 officer in the history of the police department, and Don Browning definitely did not want her in K-9. Don Browning was the

training officer in K-9 and he set out the plan for training the dogs and qualifying the dogs.

Ms. Smith also attended the training class which featured the Eric Muse videotape, and testified that the tape provided by the City in discovery, Plaintiff's Ex. 835, appeared to be an edited version of the one she saw in training class. Ms. Smith recalled that the training videotape included oral sex between the officer and the female in the motel room.

During her training at the K-9 facility, Ms. Smith saw very little of Lt. L.D. Allen, who was the head of the K-9/Equine division, and he had little to do with the training of her dog, Ex. Lt. L.D. Allen did not know much about dogs, and relied on Sgt. Browning to conduct all the training and qualification of canines. Don Browning was hostile toward Ms. Smith, treated her harshly, and did not like the fact that she was assigned to K-9.

Don Browning testified that as the manager of K-9 training, he was responsible for the day-to-day training of officers, scheduling training, and setting up training situations. As training supervisor, Sgt. Browning gave orders to the K-9 officers, and he gave the orders of how training was conducted. At the time of Ms. Smith's K-9 training, she was an officer, and Don Browning was a sergeant with the City police department.

At the K-9 facility, Ms. Smith was subjected to a dead snake placed in the women's restroom and a postcard placed on the bulletin board over Ms. Smith's mailbox with the words: "You can't run with the big dogs if you pee like a puppy." On February 14, 1996, a Wednesday training night, Sgt. Browning instructed Ms. Smith to use a solution that he had prepared to clean the kennels at the K-9

facility. Lt. Quinna Hill Macy was Ms. Smith's Hefner station supervisor, and she investigated the injury to Ms. Smith which resulted from the use a toxic disinfectant without protection. Ms. Smith required hospitalization for the injuries which resulted from the toxic fumes.

Don Browning referred to Vietnamese women as "gooks" and told Ms. Smith that in Vietnam, "we fuck 'em and stick grenades in their pussies." Sgt. Browning told Ms. Smith that the United States Police Canine Association ("USPCA") discourages female K-9 officers because of a woman's "odor" and the scent she leaves behind. On one occasion during K-9 training, Don Browning was alone with Ms. Smith and he asked her if she was on her menstrual period.

Don Browning testified that he was concerned about the aggression of Ex toward Ms. Smith, and that he asked the City veterinarian about the effect of a woman's menstrual period on a dog. On cross-examination, Don Browning denied having told the veterinarian, Dr. Petrina York, that Ms. Smith had previously acted as a prostitute to arrest johns, and that her officer skills were poor. However, Don Browning's testimony was impeached by the use of Plaintiff's Ex. 855-856, transcripts of phone interviews of Dr. York, who stated that Don Browning told Dr. York that Ms. Smith had poor partnering skills and that her previous job was to act as a prostitute. Dr. York never had a conversation with Browning about dog aggression and a woman's menstrual period, and her impression was that Don Browning did not like Ms. Smith.

Ms. Smith qualified with her dog in February 1995, and continued K-9 training for another month before her assignment to the Hefner police station. After her transfer

to Hefner, Ms. Smith continued training with Don Browning on Wednesday nights and the pattern of sexual harassment continued. Major David Shupe testified that the chain of command for K-9 officers is a "kind of complicated situation" because the K-9 officers were assigned to the four divisions with the City police department, and the K-9 division was in charge of their training and the care and upkeep of the animals, as well as the K-9 equipment.

All K-9 officers reported to the K-9 facility for training on Wednesday nights from 9:00 p.m. to 6:00 a.m., and often times the training activities were conducted outside of the K-9 facility in banks, wooded areas, or in the City of Norman. Ms. Smith's regular shift at the Hefner station was 9:30 p.m. to 6:30 a.m. In June 1995, Ms. Smith was promoted to the rank of sergeant.

From the time of her transfer to the Hefner police station until she resigned, Ms. Smith was subjected to sexual harassment, hostile work environment, retaliation and pretextual discipline. On July 22, 1998, Ms. Smith presented Plaintiff's Ex. 233, a written complaint of sexual harassment to Deputy Chief Heath.

In June 1998, Ms. Smith responded to a call at a parking lot. She got out of her police car, and saw Officer Mike Williams was standing next to a scout car with the back door open and a suspect was in the back seat. Officer Williams asked the suspect if he would like for Williams to put Ms. Smith in the back seat with him so he could have his way with her. Ms. Smith told Williams to "knock it off." In response, Williams said, "Bitch, I ought to just put you over my hood and butt-fuck you."

During July or August, 1998, at the parking lot of the Hefner station, Ms. Smith encountered Officer Darren

Raines who walked up to Ms. Smith and grabbed her crotch. In August 1998, in the break room of the Hefner station, police officer Phil Williams humiliated Ms. Smith in front of others by asking her if she had "dog cum" on her pants. Ms. Smith complained that a message was sent from her police car "MDT" unit on October 23, 1998, which read: "I like makin babbies with my dog!" Each time Ms. Smith complained to management, she was notified that there was insufficient evidence to support her complaints of sexual harassment.

In October 1998, while Ms. Smith was riding alone with her canine partner, she radioed that she was making a traffic stop. Officer Mike Williams pulled up in his police cruiser and Ms. Smith asked him to run license checks on the two occupants of the stopped car. Mike Williams said, "Don't tell me what to do, bitch," and grabbed Ms. Smith's arm and began twisting it.

In response to Ms. Smith's complaints that she was working in a hostile environment, Ms. Smith was interviewed by Major David Shupe in an intimidating and hostile manner on October 1998. Marty Stupka, the FOP president who attended the interview with Ms. Smith, said that the interview was way out-of-line and that Chief Berry's conduct was way out-of-line.

The City provided notice on January 27, 1999, Plaintiff's Ex. 109, that Ms. Smith was to be involuntarily transferred and reassigned from K-9 to the Will Rogers police station. Ms. Smith felt that the transfer was the end of her career as a police officer. On February 12, 1999, Ms. Smith filed a grievance with the FOP. On April 9, 1999, Chief Berry ordered Ms. Smith to go to John Call, Ph.D., for a fitness-for-duty evaluation. FOP president Stupka warned

Ms. Smith to be careful because Dr. Call didn't like police officers. Ms. Smith went to Dr. Call's office and tape-recorded her conversation with him. Dr. Call called Ms. Smith a sociopath and a "Milosovich sort of thing."

On June 15, 1999, at the suggestion of Marty Stupka, the president of the Fraternal Order of Police ("FOP"), Ms. Smith completed an injury-on-duty form in which Ms. Smith characterized her work environment as hostile and stated that she was being harassed. On November 16, 1999, Ms. Smith submitted her resignation.

M.T. Berry, the Chief of Police, is responsible for the sexual harassment policies for the entire City police department. However, Chief Berry does not know when sexual harassment training was conducted, if the training course includes videotapes, who teaches the subject or whether it is part of the yearly curriculum for persons in administrative capacities. Chief Berry does not know what is posted at the City police stations with regard to the sexual harassment policy or the procedure for reporting complaints of sexual harassment.

Chief Berry did not believe that a police yearbook photograph of a female officer with the caption "fresh meat" and "cherries" had any sexual connotation. Chief Berry did not see anything inappropriate about a yearbook photograph of a male officer with the caption "thinning hair due to stress trying to adjust to women in police work who aren't clerks, secretaries, or groupies." Marty Stupka, president of the FOP, testified that Chief Berry stated that it was permissible under the police department policy to have sex while on duty if the officer was cleared on his radio.

The personnel director for the City is Dianna Berry, the wife of Chief Berry. Mrs. Berry had no idea how many sexual harassment complaints were made by female employees of the City police department during Ms. Smith's employment; she had no documentation of sexual harassment training for police officers from 1994 to 1996; she does not know if sexual harassment training videotapes produced in discovery had been used or were shown to police officers; and she does not know who conducted sexual harassment training for the police department.

Near the end of the trial, an "original" Eric Muse videotape was admitted into evidence as Defendant's exhibit. The exhibit was not listed on the Final Pretrial Report, and plaintiff was not given an opportunity to view the videotape. The videotape was not played in open court because the court ruled it would take too much time – ten minutes – to play the videotape. During jury deliberations, the jury submitted a request to view the videotapes. Plaintiff objected but the court made both videotapes available to the jury during deliberations. After viewing the tapes, the jury returned a verdict for the defendant. The Court of Appeals for the Tenth Circuit reversed the jury verdict based on the jury instruction that Browning was not Smith's supervisor and remanded the case to the district court for a new trial on Smith's hostile work environment and constructive discharge claims.

REASONS FOR DENYING THE WRIT

The sole question presented by the Petition is whether a supervisor's conduct is part of a timely hostile work environment claim where the supervisor's conduct falls

outside the statutory time period. Petitioner argues that the Tenth Circuit's opinion creates a standard which is in conflict with this Court's decision in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002). However, neither the Tenth Circuit's actual ruling, nor the record below, raise the question presented by the Petition. A hostile work environment claim involved repeated conduct, and it does not matter that some of the component acts of the hostile work environment fall outside the statutory time period. The Tenth Circuit's ruling is not in conflict with *National Railroad Passenger Corp. v. Morgan*, and Respondent respectfully urges this Honorable Court to deny the Petition for Writ of Certiorari.

I. The Tenth Circuit's Ruling Does Not Conflict with *National Railroad Passenger Corp. v. Morgan* or Title VII.

The case below involves a hostile work environment claim comprised of a series of separate acts that collectively constitute one unlawful employment practice. The Petitioner creates the impression that Browning's conduct are discrete acts which are not part of the repeated conduct of Smith's hostile work environment claim and should be barred in equity or time-barred by 42 U.S.C. §§ 2000(e)-5(e)(1), et seq. Petitioner argues that the incidents involving statements and conduct of Browning are not part of the abusive working environment and because Browning was not involved in any continuing events after April 18, 1995, it would be grossly unfair to hold Petitioner liable for Browning's conduct. This Court has held that the statute does not separate individual acts that are part of the hostile environment claim from the whole for the

purposes of timely filing and liability. *See National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 118 (2002). Although Petitioner refers to Browning's conduct as "discrete acts" it never clearly identifies those retaliatory or discriminatory discrete acts or single occurrences which fall under the definition of "discrete acts." The Tenth Circuit stated that the jury could find the Petitioner vicariously liable for Browning's conduct even though it occurred outside the filing period. This Court has held an employee's EEOC charge is timely where the employee has filed a charge within 180 or 300 days of any act that is part of the hostile work environment. *See id.* The Tenth Circuit's ruling is not in conflict with *National Railroad Passenger Corp. v. Morgan*, and that holding was proper in all respects and does not call for a review by this Court.

II. This Case Does Not Present Any Novel or Important Question of Federal Law.

Petitioner argues that the Tenth Circuit's ruling holds that an employer can be vicariously liable in perpetuity for the alleged sexually hostile conduct of a supervisor. *See* Petition at 11. This contention is meritless. In *National Railroad Passenger Corp. v. Morgan*, this Court held that the entire time period of the hostile environment may be considered by a court for the purposes of determining liability even where some of the component acts of the abusive working environment fall outside the statutory time period. In this case, the conduct of Browning is part of a continuous pattern of incidents constituting a hostile work environment and this Court has held that the employer may be liable for all acts that are part of this single claim. *See National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 118 (2002). The Tenth Circuit's ruling is

correct and is not at odds with this Court's holding in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002). Review by this Court is unnecessary.

III. Petitioner Cannot Rely Upon Equitable Doctrines of Laches

Petitioner failed to preserve its arguments based on the doctrine of "laches or some similar bar." *See* Petition at 10-12, 14. Petitioner argues that it "is an injustice and grossly unfair" to hold an employer vicariously liable for the conduct of a supervisor whose conduct is part of the hostile environment claim, but whose specific acts occur outside the filing period. In the District Court, Petitioner failed to present or preserve any argument or evidence related to equitable doctrines. This case raises no significant issues which subject Respondent's claims to equitable doctrines that warrant this Court's review.

IV. The Record Does Not Support Petitioner's Argument that Intervening Acts Separated Browning's Individual Acts That Are Part of the Hostile Environment Claim From the Whole for the Purposes of Timely Filing and Liability

Petitioner argues that there were intervening discrete acts of discipline that should have operated to cut off any possibility of recovery for Browning's conduct. *See* Petition, p. 17-19. The record does not support Petitioner's argument that discipline, Smith's involuntary transfer, and resignation "cut off" any possibility of liability for Browning's conduct which occurred outside the statute of limitations. Smith's claims of sexual harassment include

disciplinary actions, retaliation and constructive discharge which are individual acts that part of the hostile environment claim and are part of the one hostile work environment claim which encompasses the whole. *See National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 117-18 (2002).

Petitioner failed to preserve its arguments based on separation of Browning's conduct by intervening acts. In the District Court, Petitioner did not present or preserve any questions related to the "intervening acts" argument, and this case raises no issues of separation of individual acts that warrant this Court's review.

CONCLUSION

Respondent respectfully submits that the Petition for a Writ of Certiorari presents no genuine issues worthy of United States Supreme Court review, and urges the Court to deny certiorari.

Respectfully submitted,

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